



Constitutionalism in the Horn of Africa

Lesson from the new constitution of Ethiopia

Balcha, Berhanu Gutema

Publication date:
2009

Document Version
Publisher's PDF, also known as Version of record

[Link to publication from Aalborg University](#)

Citation for published version (APA):

Balcha, B. G. (2009). *Constitutionalism in the Horn of Africa: Lesson from the new constitution of Ethiopia*. Institut for Historie, Internationale Studier og Samfundsforhold, Aalborg Universitet.

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal -

Take down policy

If you believe that this document breaches copyright please contact us at vbn@aub.aau.dk providing details, and we will remove access to the work immediately and investigate your claim.



DIIPER

Development, Innovation and
International Political
Economy Research

Aalborg University
Fibigerstraede 2-8a
DK-9220 Aalborg East

Phone: +45 9940 9813
Fax: +45 9635 0044

Mail: diiper@lists.ihis.aau.dk

**Constitutionalism in the Horn
of Africa: Lesson from the new
constitution of Ethiopia**

Berhanu Gutema Balcha

DIIPER RESEARCH SERIES

WORKING PAPER NO. 15



ISSN: 1902-8679

© 2009 Berhanu Gutema Balcha
Constitutionalism in the Horn of Africa: Lesson from the new constitution of Ethiopia
Development, Innovation and International Political Economy Research (DIIPER)
Aalborg University
Denmark
DIIPER Research Series
Working Paper No. 15

ISSN 1902-8679

Published by
DIIPER & Department of History, International and Social Studies
Aalborg University

Distribution
Download as PDF on
<http://www.diiper.ihis.aau.dk/research/3397011>

Lay-out and word processing
Cirkeline Kappel

The Secretariat
Development, Innovation and International Political Economy Research
Fibigerstraede 2, room 99
Aalborg University
DK-9220 Aalborg East
Denmark
Tel. + 45 9940 8310
Fax. + 45 9635 0044

E-mail: diiper@lists.ihis.aau.dk
Homepage: <http://www.diiper.ihis.dk/>

Constitutionalism in the Horn of Africa: Lesson from the new constitution of Ethiopia¹

Berhanu Gutema Balcha²

1. Introduction

A New Constitution was ratified in December 1994 and adopted in May 1995 and put into effect on 22 August 1995. The constitution officially endorses the ethnic federal restructuring in the country by declaring the establishment of a federal and democratic structure and establishment of nine regional states by declaring that sovereign power should reside with the ‘nations, nationalities and peoples’ of Ethiopia (Article 1, 8, and 47, the 1994 Ethiopian Constitution).

The constitution included crucial human and democratic rights provisions based on the Universal Declaration of Human Rights of the United Nations, which declared for unconditional respect of human rights. Notably, it claimed to have the beginning of a new chapter in Ethiopian history in which ‘each nation, nationality and people have the right to administer its own affairs within its own defined territory and effectively participate in the central government on the basis of freedom, and fair and proper representation’. Although the formal recognition of ethnic diversity and equal treatment of all ethnic groups had become the core principle of the constitution, it remains to be seen how far this constitutional rhetoric is really successful in transforming the Ethiopian state into a workable federal model. Close exploration and examination of the constitution below will indicate whether the federal arrangement in Ethiopia has been founded on a genuine covenant or agreement.

¹ This paper was presented at the Horn of Africa Workshop: What is the Way out: Challenges in Overcoming Governance Crises, Endemic Conflicts and Negative External Involvements in the Horn of Africa? The workshop took place May 26, 2008 at Aalborg University and was hosted by Development, Innovation and International Political Economy Research (DIIPER) in Collaboration with Centre for Comparative Integration Studies (CCIS), Aalborg University.

² Berhanu Gutema Balcha holds a PhD on “The Making of the State in Africa: The Experiment of ‘Ethnic-Federal’ Decentralisation in Ethiopia” from DIR – Research Center on Development and International Relations, Aalborg University.

2. Constitutional distribution of power

The constitution declares for the establishment of a parliamentary system of governance that has a two-chamber parliament at the federal level, namely House of People Representative (HPR) and House of Federation (HF) (Article 45). HPR is the federal legislative body, which has the supreme authority. Its members are elected for a term of five years by a system of a plurality of votes cast from each electoral district or constituency that has 100,000 populations. It has about 547 seats and the constitution put a limit on the number of seats of the HPR not to exceed 550.

The HPR is granted a full power of legislation in all matters assigned to the federal jurisdiction by the constitution (Article 55). The second chamber, which is called the House of Federation (HF), is composed of representatives of Nations, Nationalities and Peoples' (Article 61). It can be simply called as a house of nationalities or house of ethnic groups. According to the constitution (Article 61) that: 'Each Nation, Nationality and People shall be represented in the House of the Federation by at least one member. Each Nation or Nationality shall be represented by one additional representative for each one million of its population'.

Constitutionally, the HF has the power to interpret the Constitution and organize the council of constitutional inquiry (Article 62). Other major powers and functions of the HF include, making of decision on issues relating to the rights of Nations, Nationalities and Peoples to self-determination, including the right to secession; promote the equality of the Peoples of Ethiopia enshrined in the Constitution and promote and consolidate their unity based on their mutual consent; make every effort to find solutions to disputes or misunderstandings that may arise between States; determine the division of revenues derived from joint Federal and State tax sources and the subsidies that the Federal Government may provide to the States; determine Federal intervention if any State, in violation of this Constitution, endangers the constitutional order (Article 62).

Although the constitution allocates very vital powers and responsibilities to the HF, its ability to exercise its power has been impaired by the same constitution that permits the HF to establish permanent and ad hoc committees to exercise most of its power and functions and the constitution does not require the HF to have frequent sessions, rather it requires the HF to have at least two sessions annually (Article 67). Thus, the HF is exercising most of its power and functions through by few individuals working in the committees without making frequent consultation and decision of the whole member of the HF. The weak role of the HF has created an opportunity for concentration of power on the winner party in the federal government.

In addition, the procedure of representation in the HF allows more populous ethnic groups to have more representative in the house, and this means that they have more votes to than the smaller populous ethnic groups represented in the HF, as it is the case in the first legislative chamber, the HPR. As a result, more populous ethnic groups have more seats in both houses and thus more populous ethnic groups have a better (constitutional) power to protect their interest. This makes a case for the critiques that there is always huge difficulties to guarantee ethnic equality in Ethiopia in a straightforward manner. As this shows that in the Ethiopian federal system, both houses are apparently structured for proportional representation, but in many other federal systems, the first chamber is for a proportional representation and the second one is for an equal representation. Moreover, in the case of Ethiopia, the second chamber, namely the HF is not functioning as a legislative body, it is not involved in lawmaking process and it does not have regular session. As a result, it is very difficult to consider the federal system in Ethiopia as bicameral, thus it may be a noticeable deviation from the conventional federal principle that recognizes bicameral legislative structures as an inherent feature of the federal system (Lijphart 1977) (Davis 1978: 142). Besides, the second chamber is serving as ‘the house of every nationalities’ or a chamber for every ethnic groups in the country (Fasil 1997: 72). This shows evidence of the insignificant influence of the ethnic groups (as a group) in the legislative, policymaking and other important decision-making process in Ethiopia, wherein the Constitution declares, ‘sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia (Article 8, 1).

Besides the very fact that the regional state’s councils have the power to elect members of the HF, would also be disadvantageous for an ethnic group or ethnic constituency that elects an opposition candidate. Moreover, state councils in majority of the regional states are very weak and have very limited sessions per annum, thus in such situation the executive body of the regional states always have a tremendous power and influence in sending regional representatives for the HF. This practice could diminish a check and balance system that could be very essential in multiethnic societies in which political competition is positioned around ethnic lines.

Putting aside the operational deficiencies on the ground, a paradoxical constitutional decree has made the HF flimsy and ineffectual; the constitution can be criticized for its inconsistency in giving the HF very substantial power and functions such as interpreting the constitution, determining the division of revenues and subsidies to regional states and making of decision on issues relating to self-determination, including the right to

secession, whereas making the HF highly dependent on the states' councils and for that matter, as argued above, making it dependent on the executive bodies at the regional and the federal government levels. This phenomenon deprives the Ethiopian federal system the exclusive hallmark of a federal system, which is a division or separation of power (King 1982: 94). This may be a deliberate attempt by the framers of the constitution who foresee the difficulties in handling and satisfying various self-seeking and provincial demands of ethnic groups. However, in the absence of check and balance mechanisms, the political process could be easily abused by the ruling power to protect its own self-seeking and provincial interest. As Horowitz argues that constitutional designs have effects on the distribution of power, and those who gain power as a result may wish to alter the design to favor themselves (Horowitz 2002: 33).

The constitution states that the members of the HF are either elected by the state councils or elected by the people directly, however in the actual experience it has been the states' council that appoints their respective members in the HF. This means that the majority party in the states' councils has also a power to influence the HF in the federal government. This also shows the level of power concentration in the hands of a single winner party. In the current one-party dominant political process in Ethiopia, the EPRDF has used such constitutional loophole for its advantage to impose its power and also to protect its parochial interest in all level of the federal and regional power structures. The integrity of the constitutional design depends on the integrity of demarcating the boundary since 'the looser the design and the easier the adoption, the easier the alteration as well (Ibid. p. 32).

The constitution grants equal powers and responsibilities to the various regional states as it states that 'Member States of the Federal Democratic Republic of Ethiopia shall have equal rights and powers' (Article 47). This entails that the Ethiopian federal system is constitutionally designed to be a symmetrical federal system. Each regional state has state council that function as the legislative body of the regional government. A president who is elected by the state council leads an executive power in all of the regional states. The Constitution (Article 52) reserves all powers to the states except those given expressly to the federal government alone, or concurrently to the federal and regional governments. Some of the major powers and functions entrusted to the regional states include:

To establish a State administration that best advances self-government, a democratic order based on the rule of law; to protect and defend the Federal Constitution;

- To enact and execute the state constitution and other laws;

- To formulate and execute economic, social and development policies, strategies and plans of the State;
- To administer land and other natural resources in accordance with Federal laws;
- To levy and collect taxes and duties on revenue sources reserved to the States and to draw up and administer the State budget;
- To enact and enforce laws on the State civil service and their condition of work; in the implementation of this responsibility it shall ensure that educational; training and experience requirements for any job, title or position approximate national standards;
- To establish and administer a state police force, and to maintain public order and peace within the state.

Constitutionally, it appears very difficult to reduce or alter the power and function of any of the regional states unless the council of the concerned regional state concedes to the alteration of its power, which is of course a very unusual scenario. The constitution puts a strong protection against any easy alternation or amendment of the constitution. Any proposal for constitutional amendment should be supported by a two-thirds majority vote of a joint session of the HPR and the HF, and should also be approved by a two-thirds of the Councils of the member States of the Federation by majority votes (Article 105). More strictly, amendment to Chapter three of the Constitution that contains human rights and democratic rights including the rights of nations, nationalities, and peoples and, the provision which deals with amendment of the constitution, require the approval of all state councils by a majority vote and the approval of the HPR and HF by a two-thirds majority vote. In this regard, the constitutional approach in Ethiopia is in accordance with the basic federal principle that requires the consent of a very bigger majority group in constitutional alteration (King 1982; Elazar 1995; Watts 2000).

Nonetheless, it is one thing to put the provisions in the constitution and another to genuinely pursue them. As Leenco anticipated that the TPLF can afford to be quite generous on paper since it will not be bound by those aspects of any legislation that appear to restrain its freedom to act with impunity, (Leenco 1999: 11). Despite a gesture to devolve power to the regional states and local self-government units, the process has been marked by a centralization of power at the center that was overwhelmingly dominated by the TPLF (Young 1998: 321; Clapham 2002: 26; Merera 2003: 121). Due to the concentration of power on the TPLF/EPRDF, the exercise of power from the federal government to the *woreda* and *kebele* administrative structures has been flowing through the centralized TPLF/ EPRDF's party network, thus the declarations in the constitution do not reflect the actual power exercise in Ethiopia's federal system.

Moreover, the higher centripetal character of the federal system in Ethiopia could also be gleaned from the concentration of policymaking power on the federal government, the concentration of financial power and budget allocation responsibility on the federal government and a weak capacity of the regional states in terms of skilled manpower (Vaughan and Tronvoll 2003: 12). Abbink (1998:167) also claims that the actual division of powers between member states and federal government in Ethiopia is ‘not federal enough’ because the states do not have any role in debating the policies and in proposing legislation formulated at the federal level. He justifies this claim by pointing at the fact that other federal systems, such as the German, Canadian, Nigerian and Mexican, have given more power of this kind to the member states. Moreover, in issues concerning constitutional disputes, the regional states have a very insignificant constitutional role to challenge decisions made by the HF and Council of Constitutional Inquiry, which are structured within the jurisdiction of the federal government in which the federal executive particularly the PM has a tremendous power to influence their deliberation and operation.

3. Article 39: The right to establish self-government or the right to secede

Article 39 declares an unconditional right to self-determination, including the right to secession of every nation, nationality and peoples in Ethiopia. According to the constitution, ‘nation, nationalities or people symbolizes ‘a group of people who have or share large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory’ (Article 39, 5). Evidently, this contradicts the federal solution that aims to deter secession. According to Henze (1995: 35) that ‘the right to secede’ in Ethiopia constitution is narrowly specified without exhaustively elaborating various options of self-determination that could be more logical, practicable and humble than the destructive and impracticable ‘the right to secession’ cliché. Henze indicates experience in Spain in which autonomous communities are granted broader power of various magnitudes through a process of deliberation and bargaining in order to avoid the possibility of separation or secession. For Duchacek (1987: 207), the inclusion of the rights for secession in the federal bargain would facilitate the dissolution of the federal framework by encouraging centrifugal tendencies, but the right of secession would go along more with a confederal arrangement in which parts are completely autonomous to leave the confederation with very less difficulties and insignificant harm to each other.

The insertion of the right for secession promises in the constitution may be clichéd from the USSR constitution that put the same right in the constitution but without any practicability after the independence of Finland. At the dissolution of the USSR in 1991, the Russian federation emerged with a constitution of 1992 that allowed the right to secede as a heir of the USSR, but the 1993 constitution scrapped the right to secede and opted for a process of asymmetrical and separate arrangement with every ethnic territory for negotiated power sharing arrangements in order to deter the destructive burden of secessionism (Smith 2000). Many federal arrangements such as Canada and Switzerland have embarked on granting feasible and fair broader local autonomy arrangements in order to discourage centrifugal tendencies. In the contrary, the Ethiopia's constitutional pledges for secession; it puts a very audacious promise for 'a right to secede', but in reality the power holders are doing very little to promote genuine and feasible self-administrative structures that would discourage a pointer to the constitutional promise of secessionists' bonfire. Rather, the Ethiopian federal experience matches the ex-Soviet Union constitution that gave copious promises of self-determination including independence for its ethnic republics but responded with ruthless force when the rights were requested. To some extent, the same may be true in Ethiopia's federal constitution, which is rich and overflowing in freedom vocabularies but the actual performance is very far and opposite to the declarations. But the danger could be very great in situation which official pronouncement provokes and makes cognizant parochial ethnic consciousness by reckless advertisement of the right to secede, whereas official actions are going in opposite and extreme directions of subjugation and curtailment of ordinary rights and freedoms which of course reinforce and justify the demand for secession.

Moreover, unfulfilled flashy and celebrated promises could create a strong adverse reaction than discreetly and slightly presented ones since undelivered promise may generate more powerful resentment than the non-promised ones. In situation where the power and the resource of the regional governments are subordinate and dependent to the federal government at the center, the right to secede rhetoric could simply provide an incentive and justification to demand for secession. The regional governments in Ethiopia's federal arrangement are highly dependent on the federal government; they operate in a manner that resembles a centralized administration. The federal government has a supreme power to decide on land and natural resources, it appropriates huge tax bases, and it owns most of the nation's industrial establishments. Besides, many of the ethnic groups are not exercising most of their rights listed in article 39, whereas a few are enjoying more than what they actually deserve. Therefore, with such

sorry milieu that breeds and exacerbates resentments, the right to secede cliché can become a recipe for disaster.

Paradoxically, in Ethiopia, the ruling group, which is dominated by a minority ethnic group from an impoverished region, has an unfair control over politics and economics nationwide. At the same time, the same ruling group promises the right to secede for the various ethnic groups who are relatively better endowed with resources. However, it denies an authentic representation of these ethnic groups. Instead, it uses surrogate groups and elites to maneuver and control ethnic groups. It is, however, becoming very difficult to sustain the proxy system for long in an efficient and credible manner. As it is accounted that many of proxy officials ‘tend to be undisciplined and corrupt, which occasionally resulted in massive dismissal and demotions’ (Merera 2003: 141).

Furthermore, there is a procedural confusion regarding the constitutional provision that allows the right to every ethnic group to establish institutions of government in the territory that it inhabits and the right to establish, at any time, their own regional state. The insertion of very ambiguous and complex procedures would make the right meaningless and the intention insincere. The constitution states that the demand for statehood should be approved by a two-thirds majority of the members of the Council of the Nation, Nationality or People concerned, and it should be supported by a majority vote in the referendum (Article 47). But in majority of cases, except in SNNP region’s few ethnic groups (which have zonal council for their ethnic constituency), most of the ethnic groups do not have their own separate councils, paradoxically it is only those who have been allowed to have their own self-administrative constituency that have a council, but those ethnic groups (or ‘nations, nationalities and people’ as constitutionally named) without self-administrative constituency do not have a council that supposed to approve their demand for self-administration constituency. For example, in Benishangul-Gumuz regional states a demand by the Benishangul (or Berta) elite to have their own council was not entertained for political discussion either in the regional council or in the HF. The Benishangul people did not have their own council to approve the demand until 2003 and the state council, which was established by the five ethnic groups (the Benishangul people have only 28 out of 80 seats), rejected their demand. This created a strained relationship between the Benishangul elite and the Gumuz elite that severely thwarted the operation of the regional state and also the hostility has been deepening not only between the political elite’s of the two groups, but also among the ordinary people of Benishangul and Gumuz (A member of zonal executive from Berta, Interviewee 8 2002: 10; An Elder from Berta, Interviewee 7 2002:18; (A regional official, from Gumuz, 1, 2002: 1). A similar problem is occurring in the SNNP regional

state, some of these were the Sidama group has resented against the SNNP's council decision to deny them the ownership of Awassa city, the North Omo zone disintegrated in a bloody conflict due to the inability of the four ethnic groups to agree in a single council, the Gamo and Gofa elites are continuing their demand for a separate zonal administration and their own separate council.

Thus, the constitutional pledges for a right to self-administration or secession is more of rhetoric than an achievable promise for many of the ethnic groups, as the long and complex procedures seem difficult to fulfill. In the future, however, it would be used for facilitating and legitimizing an exit for a region that could build a capability to do so. Especially, there is a widespread suspicion that, Tigray could be the first candidate to ask for secession, if the hegemonic position of the Tigray elite in ruling Ethiopia is in jeopardy. It may be for such purpose that article 39 that pledges the right of secession is highly protected from any alteration and it needs the approval of all the regional states for its amendment, as it is declared in the constitution (Article 105) that article 39 which is included in 'fundamental principles of the constitution' can not be changed without the approval of all of the councils of the regional states, but to show a revealing comparison, article 47 of the constitution that declares the establishment of the nine regional states can be changed by the approval of a two-third of the councils of the regional states. Currently, however, the rhetoric of secession has produced two great challenges. First, it becomes an incentive for various ethnic groups to demand for a separate self-administrative constituency and separate regional state that has resulted for bloody conflict, displacement and ethnic hostility. Second, the rhetoric has generated a big voice that denounced the 'secession right' as a hidden motive to destroy the Ethiopian state. However, such big denunciation has created confusion among many ethnic groups who are suspicious regarding the motive behind the denunciation. And the ruling group successfully maneuvered the denunciation as an opposition to the rights of ethnic groups for self-administration, thus it restlessly worked for deepening the suspicion in order to capitalize political support from various ethnic groups for its hegemonic interest.

4. A flawed structure: a concentration of power on the chief executive of the federal government

The constitution (Article 45) states that Ethiopia should have a parliamentary form of government in which the majority political party or a coalition of political parties that has the greatest number of seats in the parliament, namely the HPR have a power to establish a government. This constitutional design upholds a 'winner takes all' approach.

This may be a very unsuitable political system for a multiethnic society that requires a coalition or power-sharing arrangement. A federal system in a multiethnic society could be well suited to a negotiated and consociational-like arrangement that attempts to construct unity in diversity (Elazar 1987; Watts 1999; Agranoff 1998; Lijphart 2002) As a result, a concentration of power on a single winner could not satisfy the various interests and needs of the numerous and diverse communities of multiethnic Ethiopia. Constitutionally, the winner part in the federal parliament (also similar in the regional states), has very extensive power and responsibilities, some of these are:

- Responsible for appointing the prime minister who becomes a head of the government, leader of the cabinet and the commander-in-chief of the armed force. (Article 76).
- Responsible for suggesting nominees for ministerial posts.
- Supervision over the implementation of the country's foreign policy.
- Selects and submits for approval to the House of Peoples' Representatives nominations for posts of Commissioners, the President and Vice-President of the Federal Supreme Court and the Auditor General.
- Appoints high civilian officials of the Federal Government other than those referred above.
- Supervises the conduct and efficiency of the Federal administration and takes such corrective measures as are necessary.

The majority party in the legislative always assumes an exclusive control of the executive and judiciary branches of the federal as well as the regional governments and thus the winning party assumes a total dominance of all branches of government, which is very unsuitable for a feature of multiethnic society, because federal arrangements in multiethnic would require either a coalition power centers or various centers of power. Many scholars, however, are uncertain regarding the efficiency and viability of an ethnic coalition arrangement or a proliferation of power centers in a polity (King 1982; Horowitz 1985, Elazar 1995). King, for example, argues that 'a political system within which each power is precisely checked by another would not appear to be a feasible system at all...a political system in which each social force is nicely blocked by some others, seems to represent a non-system, not a system- more anarchy than a polity' (King 1982: 64). Horowitz also claims that 'the assumption that elites in divided societies are likely to be more tolerant of other ethnic groups or less inclined to pursue advantage for their own group is extremely dubious' (Horowitz 2002: 21). Thus, he claims that creating and sustaining coalition in divided societies is a very difficult task, but, of course, not impossible. In his empirical investigation, Horowitz, finds out that 'educated

elites in some countries to be less ethnocentric than their followers, in others more, in some others neither less nor more, and in still others more with respect to some groups and less or the same with respect to other groups' (Ibid.). However, in multiethnic Ethiopia in which autocratic rule is a norm, not an exception, it has been proved futile to quell ethnic or regional demands in centralized autocracy. The parliamentary system of governance based on the 'winner takes all' principle would not be a viable prototype to Ethiopia that exhibits variations in political development, tradition of statehood, cultural assortments and ethnic and language configurations.

Furthermore, the constitution gives a strong power to the executive, particularly to the Prime Minister. The power of the Prime Minister in Ethiopia is unprecedented: he controls the armed force, the cabinet (the executive) is accountable to him; he is a head of a party that is a majority in the parliament or the legislative (90 percent majority from 1995 to 2005 and two-third majority since May 2005). As the constitution (Article 74) gives him a power to select and recommend to the HPR an appointment of Commissioners, the President and Vice-President of the Federal Supreme Court and the Auditor General, he has a significant power in influencing the judiciary and other important institutions that should be vital for checks and balances in the federal systems. Moreover, since the President and Vice-President of the Federal Supreme Court are serving as a president and vice-president respectively in the Council of Constitutional Inquiry that have powers to investigate constitutional disputes, (Article 82 and Article 84), hence, the prime minister has a greater influence to interfere with the function of constitutional inquiry. This makes the power of the prime minister in Ethiopia uncontrolled and unchecked by the executive, legislative judiciary and other federal or regional institutions. For instance, recently, connected to the May 2005 election, the Prime Minister declared an unconstitutional emergency law, but no federal institution has been able to interfere to challenge him, as there is no such constitutional power delegated to other federal or regional institutions. When the opposition party brought the case into the court, the issue was decided in favor of the Prime Minister. This is an example of a unconstitutionality³ that was backed by the court in favor of the Prime Minister by deliberately disregarding the constitutional decree that states, 'it [the Council of Ministers] has the power to declare a state of emergency; in doing so, it shall, within the time limit prescribed by the Constitution, submit the proclamation declaring a state of emergency for approval by the House of Peoples' Representatives (Article 77). Thus, the court shockingly favored the Prime Minister's authoritarian and

³ Fasil Nahum, a legal advisor to the Prime Minister in press interview, June 2005 explained that the emergency decree was unconstitutional.

unconstitutional action mainly because the court in Ethiopia is operating under a complete influence of the executive, particularly the Prime Minister.

In addition, the constitution does not put limit on the term of the Prime Minister, who has much power, but a term limit (for two terms) was placed on the post of a President, who has only a ceremonial power (Article 70). This is a very intriguing and deceptive constitutionally decree; in principle term limit should be made on the tenure of the executive in order to discourage a tendency of autocracy and power abuse by the power holder due to a longer tenure in power, but in the Ethiopia case the tenure of the executive (the great power holder) has been made infinite whereas the term limit was made on the non-executive, non-powerful and very ceremonial President. It should have been the other way round, if the purpose is it to limit abuse of power by the power holder.

At the same time, the judiciary branch is also highly dependent on the executive body. The court system is structured in a very susceptible manner to the interference of the executive branch as the Prime Minister and his majority party in the parliament is responsible for the appointments of judges, the President and Vice-President of the Supreme Court. All the powers allocated to the parliament are indirectly allocated to the prime minister, as the prime minister is the head of the majority party in the parliament. Thus, the parliament is simply a rubber-stump to the executive body. Constitutionally, a majority party in the parliament always belongs to the PM and therefore expected to endorse the PM's selection of the president and the vice-president of the Federal Supreme court that has supreme judicial authority in the country. On this point, articles 78 and 80 of the constitution declare that 'Supreme Federal judicial authority is vested in the Federal Supreme Court; the Federal Supreme Court shall have the highest and final judicial power over Federal matters and; the Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law'.

Although the constitution declares that judges should exercise their functions in full independence and should be directed solely by the law, the Judicial Administration Council, which has a power to remove judges due to violation of disciplinary rules or on grounds of gross incompetence or inefficiency, is accountable to the parliament as its decision to remove a judge should be approved by a majority vote in the parliament (Article 79). The Prime Minister also has a tremendous influence in the operation of the Judicial Administration Council, because the Council is operating within the federal government executive structure. The Council has responsibilities to assess and determine code of professional conduct and discipline as well as transfer of judges of

any court. Besides, concerning appointment of other federal judges, the federal Judicial Administrative Council has a responsibility to select candidates that should be acceptable to the PM, because the Constitution declares that: 'Regarding other Federal judges, the Prime Minister shall submit to the House of Peoples' Representatives for appointment candidates selected by the Federal Judicial Administration Council' (Article 81). The federal Judicial Administration has also a responsibility to give its views and recommendations to the regional states in nomination of their judges (Article 81). Hence, cumulatively, the gist of the matter is that all key judicial powers are at the mercy of the Prime Minister or the head of the executive branch of the federal government.

More critically, the Ethiopian federal project suffers from the absence of an independent constitutional interpretation procedure. The constitution states that the HF has the power to interpret the Constitution (Article 62, 1), but the HF is a political institution as its members are elected or appointed from elected party members, besides its members are strongly connected to and influenced by the winner party in the government. As a result, the power to interpret the constitution can certainly fall down into non-independent and partisan arm of a government. In addition, the Council of Constitutional Inquiry that was given powers to investigate constitutional disputes would be organized by the HF and also expected to submit its recommendations to the HF. Making the matter worse the President and the Vice-President of the Federal Supreme Court would become a President and Vice-President of the Council respectively. As argued above, the PM has a tremendous influence in the appointment of the presidents of the Federal Supreme Court, thus he can get a direct influence in the operation of the Council of Constitutional Inquiry that could undermine its independence and impartiality.

5. Ambiguities in the constitution

First, there is ambiguity in the constitution that declares the rights of self-government for every ethnic group in Ethiopia, which are amounted to be about 80 ethnic groups, but only nine self-government regions were established and the constitution itself create hindrance for materializing the rights for self-government for other ethnic groups by making very complicated and difficult procedures to request and establish self-government.

Second, the constitution did not make or present any convincing explanation to form the nine regional states; the criteria are not clear or not consistently applied. No clear explanation was provided for the action in compacting the numerous (more than 60)

ethnic groups with 12 million people in southern Ethiopia in a single regional self-government structure, whereas ethnic groups with lesser population and lesser viability with higher ambiguity such as the Harari people were provided a right to exercise their self-governing opportunities in the region where they constitute less than 10 percent of the populations.

Third, there is ambiguity concerning the sovereignty power, the constitution (article 8) declares that: 'All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia'. This may be tantamount to say that individuals or people are not recognized without their ethnic domain which can also contradict with the fundamentals of human rights provisions of the same constitution which declares: 'Human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable' (Article 10). The constitution itself is a cause for the curtailment of the rights of individual as it upholds the sovereignty of groups. It emphasizes the precedent of group rights over individual rights, besides since the courts are not properly structured and function to enforce the bill of rights, thus this may reflect a deficit in the application of the provisions human rights declarations.

Fourth, there is ambiguity regarding what 'nation, nationality and people' entails or represents. Very fundamental and significant rights, for example, have been granted to every 'nation, nationality and people', but actual power of executive, legislation and other authorities are granted to the regional states, not to the 'nation, nationality and people'. 'Nation, nationality and people' are not the constituting part of the federal structure; rather the regional states are the constituting part of the federal arrangement. To make an illustration, in the SNNP regional state there are about 60 'nation, nationalities and people', but only one regional state that is the constituent part of the federal system. Since ethnic-groups or 'nations, nationalities and peoples' as a uni-group or multi-group establish the regional states, there is clear distinction between the two levels of arrangements that the constitution doesn't make any attempt to make a separation. Rather the constitution gave very ambitious rights to the ethnic groups (or 'nations, nationalities and peoples, as named in the constitution) but without making any attempt how these rights would be utilized in accordance with the professed federal system of governance. The constitutional rights provided to an ethnic group in a uni-ethnic regional state can be directly translated into the rights of the regional state, but the issue would become difficult in a multi-ethnic regional state. As it was presented in the constitution that the ethnic groups or the 'nation, nationality and people' are much more focused on their insular interest whereas the regional states are expected to operate beyond such insular and affective attachment. However, the 'nation, nationality and

people' organize and control the regional state government. Thus, the regional state's government structure in multi-ethnic state has become an arena for competition between inward-looking and parochial interests that are discernibly solidified by the constitutional pledges. Contrary to many federal arrangements, the Ethiopian model gives the right to leave the federal structure to the so-called 'nations, nationalities and people' (Article 39), but not to the constituting federal states, however, 'nations, nationalities and people' are not the constituting part of the federal structure (Article 47).

6. Conclusion

Generally, Ethiopian federal system suffers from a concentration of power on the federal executive branch. Concentration of power on the federal government executive and particularly on the PM can make the federal arrangement close to a dictatorship (Abbink 1998:168). The EPRDF is powerful at all level of governance and TPLF is the dominant force in EPRDF. The prime minister, Meles Zenawi, and his close allies are dominating the TPLF; therefore this concentration of power in a few elite close the PM has made the Ethiopian federal exercise more of a caricature to mask authoritarianism. Consequently, the Ethiopian federal system suffers from the principle to limit the power of government, independence of judiciary and constitutional governance or constitutionalism. According to Vestal, Ethiopia is under a new form of authoritarianism, the 'subtler tyrannies' of the post-Cold War World. (Vestal 1999:188). The Ethiopian federal system reflects a scanty power of the regional states, the right to secede from the federation, absence of independent judiciary, absence of independent constitutional interpretation, fiscal power compete concentration on the federal government, superfluous constitutional ambiguities and concentration of power on an individual leader. It is a facade federal system, but with a caricature to misinform and pervert righteousness.

The constitution shows either mere intentions or a cover for deception. As Paul B. Henze argues that the Ethiopian constitution contains glaring contradictions, such as 'the right to secede' and 'federation', which a concern seems to be the security of the regime, rather than the practicability and consequence of the constitution (Brietzke 1995: 35). Although democratic and human rights are unconditionally promised in the constitution, there is little tolerance for alternatives as those who come into conflict with the TPLF/EPRDF are hit just as severely by extra-legal executions, torture and imprisonment without trial (Pausewang 2002: 235). Although the constitution declares that courts shall be independent and judges shall 'exercise their function in full independence' and protected from unduly removal, there have been many cases in which judges were removed for political reasons (Young 1999: 330).

It is important to give a possible explanation for such grave deficiencies of the 1994 constitution. The constitutional defect was the progeny of the defect of the transitional charter that was exclusively authored by TPLF/EPRDF with a minor role from other ethnic organizations like OLF (which withdrew from the transitional government after a year) but with the exclusion of many pertinent groups and most importantly without a genuine and free participation of the Ethiopian people. The transition charter that was produced in such flawed process became a code of conduct for the subsequent political process such as drafting of the constitution and drawing of the ethnic states. These two important functions were the basic foundations of the federal system in Ethiopia, but sadly, both of these key functions were carried out at the process that did not involve a participation and negotiation of all parties that need to be considered. Most importantly, the TPLF/EPRDF-controlled transitional government exclusively monopolized the constitutional drafting process, as it was stipulated in the Charter that the transitional government was responsible to draw up a draft constitution (Article Ten, the Transitional Charter, 1991). Consequently, the Constitutional drafting commission was established in 1993 and produced a discussion booklet, which was discussed in public meetings, international symposium and diplomatic missions. But as the whole process was controlled by the EPRDF, no substantive feedbacks were included from the public discussion. The key players were constrained from the discussion. The public discussion was simply an uninformed and uncritical deliberation that was designed for 'a perversion of education into propaganda' (Vestal 1999: 91). It was simply an attempt to secure political hegemony of the TPLF/EPRDF through a veneer of democracy. As Harbeson argues, 'since 1991 Ethiopia has acquired virtually all the forms of democracy but little of its substance' (Harbeson 1998: 62).

Consequently, the draft constitution was ratified in 1994 by the constitutional assembly which was elected from the people in which EPRDF controlled almost 95 % of the members. The oppositions completely boycotted the election. The process starting from assigning the commission to electing the constitutional assembly and ratifying the constitution was absolutely dominated by the ruling party. It was purely a façade that masked an authoritarian regime (Ibid. p. 66).

This signifies the fail of the second (the first was the transitional charter) grand covenant, which could have been the very basic foundation of the federal pact. Many groups such as nearly all the opposition groups, the civil society movements, and the Ethiopian in Diaspora overwhelmingly rejected the Constitution. As a result, the constitution has become the document of the ruling party and its affiliated organizations.

It was an imposed 'federal covenant' on the Ethiopian people without their genuine participation and consent. It was implemented in a manner completely dominated by a power at the center in collaboration with the co-opted elites at the regional as well as local levels and the unfairly privileged very tiny ethnic groups. Thus, the 1994 Ethiopian constitution is denoted as the constitution of the TPLF/EPRDF because it only reflects the ideology and wishes of the TPLF-led EPRDF. To conclude, I will cite from John Young, a close examiner of and more sympathetic to the TPLF, who states: 'Constitutional making under the EPRDF has little in common with the bargaining, trade-offs, and compromises that usually typify such process; rather it reflects the weakness of the country's democratic institutions, the political objectives of the governing party, and its position of dominance with a state where serious opposition had been crushed or marginalized (Young 1998: 195).

References

- Abbink, J. (1998) "New configurations of Ethiopian ethnicity: the challenge of the South", *Northeast African Studies* 5, 1.
- Agranoff, Robert (1998) Power Shifts, Diversity and Asymmetry. In Robert Agranoff (ed), *Accommodating Diversity: Asymmetry in Federal States*, Baden-Baden: Nomos Verlagsgesellschaft.
- Brietzke, P.H. (1995) "Ethiopia's 'leap in the dark': federalism and self-determination in the new constitution". *Journal of African Law* 39: 19-38.
- Clapham, Christopher (2002) 'Controlling Space in Ethiopia', in James, Wendy, Donald I. Donham, Eisei Kurimoto, and Alessandro Triulzi (eds.) *Remapping Ethiopia: Socialism & After*, University of Ohio Press & James Curry Press.
- Constitution of The Federal Democratic Republic of Ethiopia 1994, Addis Ababa.
- Davis, S.R. (1978) *The Federal Principle: A Journey throughout time in quest of a meaning*, Berkeley: University of California Press.
- Donald L., Kurimoto, Eisei, and Triulzi, Alessandro (eds.) (2002) *Remapping Ethiopia*, London: James Currey.
- Elazar, Daniel J. (1987) *Exploring Federalism*, Tuscaloosa: The University of Alabama Press.
- Elazar, Daniel J. (1995) 'From Statism to Federalism: A paradigm Shift', *Publius: The Journal of Federalism*, 25(2).
- Fasil Nahum (1997) *Constitution for a nation of nations: The Ethiopian prospect*, New Jersey and Asmara: The Red Sea Press, Inc.
- Harbeson, John W. (1998) "Is Ethiopia Democratic? A Buraucratic Authoritarian Regime", *Journal of Democracy*, Vol. 9 No.4 (October 1998): 40-54.
- Horowitz, Donald L. (1985) *Ethnic Groups in Conflict*, Berkeley, Los Angeles, and London: University of California Press.
- Horowitz, Donald L. (2002) "Constitutional Design: Proposals versus Processes", in Andrew Reynolds (ed.), *The Architecture of Democracy, Constitutional Design, Conflict Management, and Democracy*, Oxford: Oxford University Press.
- King, Preston (1982) *Federalism and Federation*, Maryland: The John Hopkins University Press.
- Leenco Lata (1999) *The Ethiopian State at the Crossroads. Decolonisation & Democratisation or Disintegration?*, Lawrenceville: Red Sea Press.
- Lijphart, Arend (1977) *Democracy in Plural Societies*. New Haven: Yale University Press.
- Lijphart, Arend (2002) 'The Wave of Power-Sharing Democracy' in Andrew Reynolds (ed.) *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*, Oxford: Oxford University Press.
- Merera Gudina (2003) *Ethiopia: Competing ethnic nationalisms and the quest for democracy, 1960 – 2000*. PhD dissertation.
- Smith, Anthony (2000) *The Nation in History: Historiographical Debates about Ethnicity and Nationalis*, Cambridge: Polity Press.
- Pausewang, Siegfried, Kjetil Tronvoll, and Lovise Aalen (eds.) (2002) *Ethiopiainsincethe Dergue: A decade of democratic pretensions and performance*, London: Zed Books.
- Vaughan, Sarah and Kjetil Tronvoll (2003) 'The Culture of Power in Contemporary Ethiopian Political Life', *SIDA Studies*, No. 10. Printed by Edita Sverige AB.
- Vestal, Theodore M. (1999) *Ethiopia: A Post-Cold War African State*, London: Praeger.
- Watts, Ronald (1999/2000) 'Federalism and Diversity in India', in Yash Ghai (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic states*, Cambridge, Cambridge University Press.
- Watts, Ronald (1999) *Comparing Federal Systems*, London: McGill-Queen's University Press.

- Young, John (1999) 'Along Ethiopia's western frontier: Gambella and Benishangul in transition', *The Journal of Modern African Studies*, 37, 2 (1999), pp. 321-346.
- Young, John (1998) 'The Tigray people's Liberation Front', in Christopher Clapham (ed.) *African Guerrillas*, Bloomington: Indiana University Press.
- Young, John (1998b) 'Regionalism and democracy in Ethiopia', *Third World Quarterly*, 19:191-204.

**DIIPER RESEARCH SERIES
WORKING PAPERS:**

- No. 1. *Gorm Winther*: Democracy and Power in Greenland – the Appearance of a New Class?, 27 pp, 2007.
- No. 2. *Angathevar Baskaran & Mammo Muchie*: The Making of the Indian National Innovation Systems: Lessons on the specific characteristics of the domestic and the external co-evolutions of technologies, institutions and incentives, 32 pp, 2007.
- No. 3. *Wang Weyi*: Chinese Culture of Social Interactions: Current Sequential Organizations in Gift Offering and Acceptance, 15 pp, 2007.
- No. 4. *Angathevar Baskaran & Mammo Muchie*: The Impact of the National Innovation Systems on the Flow and Benefits of Foreign Direct Investment to National Economics, 38 pp, 2008.
- No. 5. *Ann Sasa List-Jensen*: Economic Development and Authoritarianism - A Case Study on the Korean Developmental State, 27 pp, 2008.
- No. 6. *Berhanu Gutema Balcha*: Ethnicity and restructuring of the state in Ethiopia, 24 pp, 2008.
- No. 7. *Angathevar Baskaran & Mammo Muchie*: Foreign Direct Investment and Internationalization: The Case of BRICS Economics, 33 pp, 2008.
- No. 8. *Introduction and Edited by Li Xing*: Workshop Volume – The Rise of China and Its Impact on the Existing Capitalist World System, 214 pp, 2008.
- No. 9. *Tesfatsion Medhanie*: Constitution-making, Legitimacy and Regional Integration: An Approach to Eritrea’s Predicament and Relations with Ethiopia, 36 pp, 2008.
- No. 10. *Li Xing*: The Development of “Four China” in Sino-Western Relations, 17 pp, 2009.
- No. 11. *Eshetu Bekele & Mammo Muchie*: Promoting micro, small and medium Enterprises (MSMEs) for sustainable rural Livelihood, 21 pp, 2009.
- No. 12. *Kelvin Harewood*: The philosophical and practical basis for peace-building in the Horn of Africa and beyond, 18 pp, 2009.
- No. 13. *Abdulkadir Osman Farah*: Diaspora involvement in the development of Somalia, 24 pp, 2009.
- No. 14. *Amira Osman*: Sudanese women in civil society and their roles in post-conflict reconstruction, 9 pp, 2009.
- No. 15. *Berhanu Gutema Balcha*: Constitutionalism in the Horn of Africa: Lesson from the new constitution of Ethiopia, 19 pp, 2009